

prior or subsequent to carrying on operations named in sections 13(a)(5) or section 13(b)(4) are properly to be considered as employed "in" the named operations because their work is so close in point of time and function to the conduct of the named operations that the employment is, as a practical matter, necessarily and directly a part of carrying on the operation for which exemption was intended. Depending on the facts and circumstances, this may be true, for example, of employees who perform such work as placing boats and other equipment in condition for use at the beginning of the fishing season, and taking the necessary protective measures with respect to such equipment which are required in connection with termination of the named operations at the end of the season. Where such work is integrated with and is required for the actual conduct of the named operations on the specified aquatic forms of life, and is necessarily performed immediately before or immediately after such named operations, the employees performing it may be considered as employed in the named operations, so as to come within the exemption. It should be kept in mind that the relationship between the work of an employee and the named operations which is required for exemption is not necessarily identical with the relationship between such work and the production of goods for commerce which is sufficient to establish its general coverage under the Act. Thus, repair, overhaul, and reconditioning work during the inactive season which does not come within the exemption is nevertheless closely related and directly essential to the production of goods for commerce which takes place during the active season and, therefore, is subject to the provisions of the Act (*Farmers' Reservoir Co. v. McComb*, 337 U.S. 755; *Mitchell v. Stinson*, 217 F. 2d 210; *Bowie v. Gonzalez*, 117 F. 2d 11; *Weaver v. Pittsburgh Steamship Co.*, 153 F. 2d 597, cert., den., 328 U.S. 858).

§ 784.114 Application of exemptions on a workweek basis.

The general rule that the unit of time to be used in determining the application of the exemption to an employee is the workweek (see *Overnight*

Motor Transportation Co. v. Missel, 316 U.S. 572; *Mitchell v. Stinson*, 217 F. 2d 210; *Mitchell v. Hunt*, 263 F. 2d 913; *Puerto Rico Tobacco Marketing Co-op. Ass'n. v. McComb*, 181 F. 2d 697). Thus, the workweek is the unit of time to be taken as the standard in determining the applicability to an employee of section 13(a)(5) or section 13(b)(4) (*Mitchell v. Stinson*, supra). An employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It may begin at an hour of any day set by the employer and need not coincide with the calendar week. Once the workweek has been set it commences each succeeding week on the same day and at the same hour. Changing the workweek for the purpose of escaping the requirements of the Act is not permitted. If in any workweek an employee does only exempt work he is exempt from the wage and hours provisions of the Act during that workweek, irrespective of the nature of his work in any other workweek or workweeks. An employee may thus be exempt in one workweek and not the next (see *Mitchell v. Stinson*, supra). But the burden of effecting segregation between exempt and non-exempt work as between particular workweeks is on the employer (see *Tobin v. Blue Channel Corp.*, 198 F. 2d 245).

§ 784.115 Exempt and noncovered work performed during the workweek.

The wage and hours requirements of the Act do not apply to any employees during any workweek in which a portion of his activities falls within section 13(a)(5) if no part of the remainder of his activities is covered by the Act. Similarly, the overtime requirements are inapplicable in any workweek in which a portion of an employee's activities falls within section 13(b)(4) if no part of the remainder of his activities is covered by the Act. Covered activities for purposes of the above statements mean engagement in commerce, or in the production of goods for commerce, or in an occupation closely related or directly essential to such production or employment in an enterprise engaged in commerce or in the

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production of goods for commerce, as explained in §§ 784.17 through 784.19.

§ 784.116 Exempt and nonexempt work in the same workweek.

Where an employee, during any workweek, performs work that is exempt under section 13(a)(5) or 13(b)(4), and also performs nonexempt work, some part of which is covered by the Act, the exemption will be deemed inapplicable unless the time spent in performing nonexempt work during that week is not substantial in amount. For enforcement purposes, nonexempt work will be considered substantial in amount if more than 20 percent of the time worked by the employee in a given workweek is devoted to such work (see *Mitchell v. Stinson*, 217 F. 2d 210). Where exempt and nonexempt work is performed during a workweek by an employee and is not or cannot be segregated so as to permit separate measurement of the time spent in each, the employee will not be exempt (see *Tobin v. Blue Channel Corp.*, 198 F. 2d 245; *Walling v. Public Quick Freezing and Cold Storage Co.*, 62 F. Supp. 924).

§ 784.117 Combinations of exempt work.

The combination of exempt work under sections 13(a)(5) and 13(b)(4), or one of these sections with exempt work under another section of the Act, is permitted. Where a part of an employee's covered work in a workweek is exempt under section 13(a)(5) and the remainder is exempt under another section which grants an exemption from the minimum wage and overtime provisions of the Act, the wage and hours requirements are not applicable. If the scope of the exemption is not the same, however, the exemption applicable to the employee is that provided by whichever exemption provision is more limited in scope unless, of course, the time spent in performing work which is nonexempt under the broader exemption is not substantial. For example, an employee may devote part of his workweek to work within section 13(b)(4) and the remainder to work exempt from both the minimum wage and overtime requirements under another section of the Act. In such a case he must receive the minimum wage but is

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not required to receive time and one-half for his overtime work during that week (*C.F. Mitchell v. Myrtle Grove Packing Co.*, 350 U.S. 891; *Tobin v. Blue Channel Corp.*, 198 F. 2d 245). Each activity is tested separately under the applicable exemption as though it were the sole activity of the employee for the whole workweek in question. Unless the employee meets all the requirements of each exemption a combination exemption would not be available.

GENERAL CHARACTER AND SCOPE OF THE SECTION 13(a)(5) EXEMPTION

§ 784.118 The exemption is intended for work affected by natural factors.

As indicated by the legislative history, the purpose of the section 13(a)(5) exemption is to exempt from the minimum wage and overtime provisions of the Act employment in those activities in the fishing industry that are controlled or materially affected by natural factors or elements, such as the vicissitudes of the weather, the changeable conditions of the water, the run of the catch, and the perishability of the products obtained (83 Cong. Rec. 7408, 7443; S. Rep. No. 145, p. 33 on H.R. 3935, 87th Cong., first session; *Fleming v. Hawkeye Pearl Button Co.*, 113 F. 2d 52; *Walling v. Haden*, 153 F. 2d 196, certiorari denied 328 U.S. 866).

§ 784.119 Effect of natural factors on named operations.

The various activities enumerated in section 13(a)(5)—the catching, taking, propagating, harvesting, cultivating, or farming of aquatic forms of animal or vegetable life as well as “the going to and returning from work” are materially controlled and affected by the natural elements. Similarly, the activities of “first processing, canning, or packing of such marine products at sea as an incident to, or in conjunction with, such fishing operations” are subject to the natural factors mentioned above. The “loading and unloading” of such aquatic products when performed at sea are also subject to the natural forces.